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19
20 **UNITED STATES DISTRICT COURT**
21 **DISTRICT OF NEVADA**

22 MARK HUNT, an individual,
23
24 Plaintiff,
25 v.

26 ZUFFA, LLC d/b/a ULTIMATE
27 FIGHTING CHAMPIONSHIP, a
28 Nevada limited liability company;
BROCK LESNAR, an individual;
DANA WHITE, an individual; and
DOES 1-50, inclusive,
Defendants.

Case No.: 2:17-cv-00085-JAD-CWH

**MARK HUNT'S POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT BROCK LESNAR'S
FOURTH REQUEST FOR JUDICIAL
NOTICE PURSUANT TO FEDERAL
RULES OF EVIDENCE RULE 201**

Plaintiff, Mark Hunt ("Hunt"), respectfully requests that this Court deny Brock Lesnar's ("Lesnar") Fourth Request for Judicial Notice of Exhibit "B" (Nevada State Athletic Commission Sample Bout Agreement). This Court should exclude Lesnar's extrinsic evidence because the

exhibit was not incorporated by reference, is not directly related to Hunt's Supplemental Complaint, and is neither publicly available nor capable of accurate and ready determination. This Court's consideration of Lesnar's motion to dismiss Hunt's complaint should be limited to the pleadings.

Hunt has no objection to the consideration of Exhibit A, the hearing transcript from May 22, 2017, on Defendants' first motion to dismiss, for the limited purpose of convenience to the Court and parties' reference. However, the hearing constituted only the argument of the parties and the Court's determinations regarding the original complaint. Clearly, Exhibit A does not affect the outcome of Lesnar's motion to dismiss Hunt's Supplemental Complaint. In fact, Exhibit A tends to show that any prior deficiency has been cured.

Finally, Hunt notes Lesnar's request for judicial notice is futile, regardless of the Court's consideration of Exhibit B. The plain language of the document states that the State of Nevada, and not Lesnar, may raise the express assumption of the risk defense. Thus, the document is not "directly related to Mr. Hunt's [Supplemental] Complaint" as Lesnar claims, ECF No. 116 at 3:11-12, rather, it is only related to a theoretical defense of a nonparty – the State of Nevada.

I.

LEGAL STANDARD

"[A] district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citing *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)); see *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993) (holding when the legal sufficiency of a complaint's allegation is tested by a 12(b)(6) motion, "review is limited to the complaint."). An exception to this general rule is the doctrine of judicial notice pursuant to Federal Rule of Evidence 201. A court may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment, but may not take judicial notice of a fact that is "subject to reasonable dispute." Fed. R. Evid. 201(b); *Lee*, 250 F.3d at 689 (citing *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 204 (9th Cir. 1986)).

1 **II.**

2 **COURT'S PREVIOUS DENIAL OF LESNAR'S REQUESTS FOR JUDICIAL NOTICE**

3 At the hearing on Lesnar's first motion to dismiss, other than publicly filed records, the
4 Court denied Lesnar's requests (12 total) for judicial notice of documents outside the four corners
5 of the complaint. The Court explained:

6 *"Although the parties have offered me a number of items outside the four corners of the*
7 *Complaint, like affidavits, newspaper articles, emails, YouTube videos, UFC policy and press*
8 *releases, and fight records, suggesting that I can take judicial notice of them, I Decline that*
9 *request. I am not going to turn this into a motion for summary judgment at this time. I am*
10 *keeping this within the four corners under 12(b)(6).*

11 *These materials, first of all, are not properly the subject of judicial notice. Their meaning*
12 *is disputed. There is not universal agreement on them.*

13 ECF No. 65 (May 22, 2017 hearing).

14 **III.**

15 **ARGUMENT**

16 **Judicial Notice of Exhibit B Should be Denied or Extremely Limited**

17 Lesnar asks the Court to go beyond the pleadings to a bout agreement not contained or
18 even referenced in Hunt's complaint. Exhibit B purports to be a Nevada State Athletic
19 Commission Sample Bout Agreement. The title alone is instructive here. It is a "sample"
20 agreement. It is not executed by Hunt, UFC, or Lesnar. However, Lesnar not only asks the Court
21 to acknowledge the existence of the Sample Bout Agreement, he asks the Court to pretend it is a
22 fully executed copy, and then pretend Lesnar would be a party to even an executed copy of the
23 agreement. That is, Lesnar asks the Court to consider one document for purposes of taking
24 judicial notice (a sample bout agreement), but consider another document for its substantive
25 analysis (a fully executed bout agreement). Indeed, if the agreement were "publicly available
26 and capable of accurate and ready determination," then Lesnar would have attached an executed
27 copy.¹

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¹ Even ignoring the fact that evidentiary declarations are improper for substantive Rule 12(b)(6) motions, the

1 Notably, the bout agreement Lesnar seeks to introduce is the Nevada State Athletic
 2 Commission's Official Bout Agreement. This is *not* referenced in any manner in Hunt's
 3 complaint, which refers and incorporates only the UFC 200 Bout agreement. To clarify any
 4 potential confusion, both documents are coincidentally titled "Exhibit B." Exhibit B to Hunt's
 5 complaint is the UFC 200 Bout Agreement; Lesnar's Exhibit B is a different document, which
 6 was neither incorporated, referenced or relied upon in Hunt's complaint. Therefore, the Court
 7 should decline to consider the Sample Bout Agreement.

8 This Court should deny Lesnar's request for judicial notice of Exhibit B, however, to the
 9 extent the Court takes judicial notice of Exhibit B, it should be limited to the mere fact that the
 10 document exists, because the contents and interpretation of the document is highly disputed. *See*
 11 *Montana Dep't of Revenue v. Blixseth*, No. 2:13-CV-01324-JAD, 2016 WL 1183084, at *2 (D.
 12 Nev. Mar. 28, 2016) (denying request for judicial notice to the extent it seeks judicial notice of
 13 the truth of its contents); *see also Carrillo v. Gillespie*, No. 2:12-CV-02165-JAD, 2014 WL
 14 1307454, at *7 (D. Nev. Mar. 28, 2014) (holding the Court could not take judicial notice of the
 15 truth or perjury regarding contents of police officer's sworn statement, because it was "subject to
 16 reasonable dispute" (interpreting Fed. R. Evid. 201)).

17 IV.

18 CONCLUSION

19 For the above reasons, Hunt respectfully requests that the Court deny Lesnar's request for
 20 judicial notice of Exhibit B.

21 DATED: April 6, 2018

HIGGS FLETCHER & MACK LLP

22 By: /s/ Joseph A. Gonnella

23 CHRISTINA M. DENNING, ESQ.

24 SCOTT J. INGOLD, ESQ.

25 JOSEPH A. GONNELLA, ESQ.

Attorneys for Plaintiff

26 MARK HUNT

27
 28 supporting declaration of Kendelee L. Works lacks foundation regarding the contents and execution of an agreement
 between Hunt and the State of Nevada.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5 and the Court's Local Rules, the undersigned hereby certifies that on this day, April 6, 2018, a copy of the foregoing document entitled **MARK HUNT'S POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BROCK LESNAR'S FOURTH REQUEST FOR JUDICIAL NOTICE PURSUANT TO FEDERAL RULES OF EVIDENCE RULE 201** was filed and served through the Court's electronic filing system (CM/ECF) upon all registered parties and their counsel.

/s/ Barbara Lodovice

Barbara Lodovice

An employee of Higgs Fletcher & Mack LLP